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Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

L. HOLMES ELEAZER, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, L. Holmes Eleazer, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on November 7, 1949, reversing the judgment of the United States District Court for the Eastern District of South Carolina entered on January 29, 1949, in favor of petitioner, and directing the District Court to enter judgment for the United States.

STATEMENT OF MATTERS INVOLVED

Petitioner, suing the United States under the authority of the Federal Tort Claims Act (60 Stat. 842, 28 USC 921, et seq., codified since this case arose into separated sections of new Title 28 USC), was awarded in the District Court a judgment for $30,000.00 in compensation for serious bodily injuries suffered by him as a result of the negligent operation of an automobile by Lieutenant James B. Talley of the United States Marine Corps upon a highway in North Carolina on August 20, 1946. Upon appeal by the United States, the Court of Appeals reversed the judgment and directed the entry of judgment for the United States, holding (1) that Lt. Talley was not, at the time and place of his admittedly negligent driving, acting within the scope of his employment by the Marine Corps; and (2) that it was not sufficient to show that he was acting within the line of his military duty as a Marine Corps officer.

The finding of no "scope of employment" was made by the Court of Appeals, despite the fact that Lt. Talley was, at the time of his collision with the petitioner, performing travel under an official written order of the Marine Corps directing him to proceed from the Marine Station at Cherry Point, N. C., to the station at Corpus Christi, Texas, for military duty there, the order stating that the travel directed was "necessary in the public service" and obligating the Government, under 17 USC 112, to pay for the travel performed on a most direct mileage basis, and the collision occurring a few miles outside of Cherry Point on the most direct route to Corpus Christi.

The Court of Appeals based its conclusion upon the ground that because the Lieutenant had the privilege of performing this travel in his own automobile and could, under the order, later stop at his home in Atlanta, Georgia, before completing the ordered travel to Corpus Christi, the Government lacked the control over his conduct which is requisite to a *respondeat superior* recovery.

The Court's finding that it was not sufficient for petitioner's recovery to prove that Lieutenant Talley was acting within his "line of duty" was made despite the fact that Congress in Section 402 (c) of the Federal Tort Claims Act (28 USC 941) provided that: "'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

If we correctly interpret the opinion below it will bar any recovery against the United States for injuries inflicted by a Government agent traveling on the Government's business if he is driving a privately owned automobile. Certainly it will bar recovery (for that is the case at bar) if such agent purposes to break his official travel by stopping at a way station for personal reasons, even though his negligent injury of a third person occurs before such break and on the direct route of the ordered travel.

This decision so "substantially affects the area of private suit against the Government" [1] that this Court is asked to review it.

QUESTIONS PRESENTED

1. Was it error for the Court of Appeals to hold that the Government was so lacking in control over travel being performed by the Marine officer in his own automobile as to take the travel, although ordered at Government expense, out of the scope of his employment?

2. Was it error for the Court of Appeals to hold that the fact that the Marine Officer intended to suspend his official travel at Atlanta in order to enjoy a few days of leave there took the travel, while being performed on the most direct route between the terminal points, out of the scope of his employment?

3. Was it error for the Court of Appeals to refuse to give effect to the express provision by Congress in the Tort Claims

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[1] *United States of America v. Spelar*, Cert. granted 336 U. S. 950; Opinion, ——U. S.——, 18 L. W. 4012.

Act that there is a sufficient showing of scope of employment on the part of a member of the armed forces when it is established that he is acting within his line of duty?

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider and grant this petition under Title 28 USC, Section 1254.

The judgment of the Court below was entered November 7, 1949. An order was entered by the Court below on December 2, 1949, staying its mandate provided an application for a Writ of Certiorari be filed in this Court within thirty days from that date.

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In reversing the judgment of the District Court.

2. In holding that the Marine Officer who negligently injured the petitioner was not acting at the time within the scope of his employment by the United States.

3. In deciding questions of substantive agency law not in conformity with the law of the state where the negligent act occurred as required by the Tort Claims Act. (28 USC 941.)

4. In refusing to give effect to the Congressional enactment that "acting within the scope of employment" in the case of a member of the military or naval forces of the United States means "acting in line of duty," and to apply the long established administrative construction of "line of duty" to the status of the Marine officer at the time and place of his negligent conduct.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Court of Appeals that the Government is not liable under the Federal Tort Claims Act for the negligent performance of travel orders by an agent of the Government traveling in his own automobile is a fundamental

decision affecting the scope of an important Federal Statute which has not been, but should be, settled by this Court.

2. The decision of the Court of Appeals that the Government is not liable under the Federal Tort Claims Act for the negligent performance of travel orders by an agent of the Government when the agent, although not departing from the direct route of the ordered travel, plans to stop *en route* on personal business is a fundamental decision affecting the scope of an important Federal Statute which has not, but should be, settled by this Court.

3. The decision of the Court of Appeals that the Marine Officer was not acting within the scope of his employment with the Government because he was driving his own automobile or because he planned to later interrupt his official travel by spending a few days of leave at home is a decision of an important question of the substantive law of North Carolina probably in conflict with applicable North Carolina decisions; *Pinnix v. Griffin,* 219 N.C. 35, 12 S.E. (2d) 667; *Lassiter v. Cline,* 222 N.C. 271, 22 S.E. (2d) 558; *Parrott v. Kantor,* 216 N.C. 584, 6 S.E. (2d) 40, and therefore in conflict with the Federal Tort Claims Act.

4. The decision of the Court of Appeals that Congress did not prescribe a more liberal *respondeat superior* standard for military personnel than for other Government employees is a decision as to the constuction of an important Federal Statute which has not been, but should be, settled by this Court.

5. The decision of the Court of Appeals that Congress did not prescribe a more liberal *respondeat superior* standard for military personnel than for other Government employees is a decision disregarding the clear language of the Statute and is therefore probably in conflict with applicable decisions of this Court. *Brooks v. United States,* .... U.S. ...., 93 L.Ed. 884; *Hellmich v. Hellman,* 276 U.S. 233; *Stairs v. Peaslee,* 59 U.S. 521.

WHEREFORE, your petitioner prays that this Court issue its Writ of Certiorari to the United States Court of

Appeals for the Fourth Circuit to review the judgment of that Court herein; that the judgment of that Court be reversed; and for such further relief as to this Court may seem proper.

Respectfully submitted,

JAMES F. DREHER,
DAVID W. ROBINSON,
BLATT & FALES,
Attorneys for Petitioner.

December 30, 1949

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

L. HOLMES ELEAZER, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A summary of the matters involved in this application, a statement of this Court's jurisdiction, and a specification of errors in the Court below all appear sufficiently in the Petition to which this brief is appended.

Petitioner's brief is framed in three sections pointing to substantial error in each of three principal conclusions by the Court of Appeals which may be summarized (probably in the order of importance) as follows: (1) The Marine Officer, if acting for the Government in performing his travel, was acting as an independent contractor, with the Government having no right to control his operation of his automobile. (2) The Marine Officer was actually not serving the Government in performing the travel but was instead fulfilling his own purposes by going home on leave. (3) Even though he was in line of duty in the military sense, Congress did not intend, despite the language of Section 402(c) of

the Tort Claims Act, to allow recovery against the Government on that ground.

I.

The Marine Officer was not Independent of Government Control

The whole of the opinion below is built upon the premise that the Government had no right to control the operation of the Marine Officer's private automobile in complying with his change-of-station order. The conclusion is therefore drawn that the officer was not acting as a servant of the Government at all, but rather as an independent contractor for whose acts the employer is not responsible.

The authorities support the general proposition that a right of control is requisite in every master-servant relationship. That has always been an axiom of agency law; but it has always been an admittedly theoretical concept, and the courts, never requiring that right of control be established as an independent fact, have found the relationship in a myriad of subsidiary circumstances. The *Restatement of the Law of Agency,* Section 220, in discussing the right of control test as distinguishing a servant from an independent contractor, can do no more than list numerous factual considerations which may throw light upon the final determination of that issue.

Different courts are prone to emphasize different facts in deciding whether an employer can be said to have sufficient right of control over an employee to make the employee a servant with resulting *respondeat superior* liability against the master. The North Carolina decisions, which the Court was obligated to follow in the present case, are committed to the rule that the "right to fire" is virtually conclusive proof of a master-servant relationship. *Lassiter v. Cline,* 222 N.C. 271, 22 S.E. (2d) 558, in which the Court said:

> Certainly the "right to fire" is one of the most effective methods of control, and this power the defendants' witness testified he possessed over Thomas the driver

of the colliding truck; and this irrespective of whether the truck belonged to Thomas or to the defendant. Chief Justice Clerk in *Evans v. Lumber Co.*, 174 N.C. 31, 93 S.E. 430, 431, 30 A.L.R. 1498, thus states the law in this jurisdiction: "In this case the employer had power to terminate Spruill's employment at any time. This gave the defendant potential control over him, and is conclusive that Spruill was not an independent contractor, for whose negligence the defendant was not responsible."

Had the Court applied this law it could not have reached the conclusion that the Marine Corps had no right of control over its Officer while performing travel under official orders. Nor could it have so decided if it had considered the basic relationship between a person in the armed forces and his military superiors. This Marine Officer owed at all times an exclusive and unqualified allegiance to his superior officers and was subject to their command at every moment until his separation from the service. *Articles for the Government of the Navy*, Art. 4, 34 USC 1200.

His commanding officer could have revoked his change-of-station orders at any time; could have directed him to go to any other place by another route; and had he been present, could have controlled the physical details of the performance of the travel order. Unlike a civilian employee of the Government, the officer could not quit his employment rather than obey the order. It was military compulsion, the strongest possible "right of control," which sent him from North Carolina to Texas.

Even in ordinary industrial employment, where this unique and absolute control of a military subordinate is not present, there are cases holding (with none found to the contrary) that an employer is liable under *respondeat superior* principles for the negligent operation by an employee of his own automobile being used to accomplish an order by the employer that he change the headquarters of his work from one city to another.

Such a civilian "change-of-station" case is the Virginia decision of *Barber v. Textile Machine Works*, 178 Va. 435, 17

S.E. (2d) 359. In that case an employee of the defendant named Ammann had been engaged in installing certain machinery in Tennessee. Completing this work, he wired the defendant's office in Pennsylvania for instructions and was directed to report there and await further orders. Ammann's hourly wages covered the time spent in traveling and in addition he received traveling expenses based upon the railroad fare between terminal points. The defendant had not authorized the use of his automobile in making these changes, but there was evidence that it knew some of its employees used their own cars and that it had some indication that Ammann used his. Upon these facts, the Court upheld the liability of the employer, saying:

> Under the facts of the instant case, we find that Ammann, an agent of the Textile Machine Works, had implied authority to operate his own automobile in the business of the Company. Furthermore, the company had at least potential control over the operation of his car, inasmuch as he was being paid a salary while traveling and was subject to the control of the company as to where and when he should go. He was also acting within the scope of his employment at the time of the collision when he was returning to Pennsylvania in compliance with the instructions of the defendant company.

No North Carolina decision has been found involving just this situation, but the Supreme Court of North Carolina has held in *Tomlinson v. Sharpe,* 226 N.C. 177, 37 S.Ed. (2d) 498, that its application of *respondeat superior* principles is the same as that of the Virginia courts.

On all fours with the *Barber case* is *Webster v. Mountain States Tel. & Tel. Co.,* 108 Mont. 188, 89 P. (2d) 602; and the holding in such cases has support in many decisions involving comparable situations: Where the employee is directed to attend a convention and return (Cf. *Long v. McKay,* 295 Mich. 494, 295 N. W. 239), and where the employee in his business must spend nights away from home and drives his automobile to towns convenient for that purpose (Cf. *Adams v. Power Co.,* 200 S.C. 438, 21 S.E. (2d) 17).

The theory of the Court below as to right of control would apparently bar any recovery against the Government when a Government employee is using his own automobile to perform ordered travel. That is in direct conflict with the North Carolina decisions, for recovery is allowed against an employer for injuries inflicted by an employee driving his own automobile when the facts gave rise to an inference that the employee was, at least in part, furthering the employer's business and had the employer's permission, express or implied, to use his own automobile: *Pinnix v. Griffin,* 219 N.C. 35, 12 S.E. (2d) 667; *Barrow v. Keel,* 213 N.C. 375, 196 S.E. 366; *Davidson v. Western Union* 207 N.C. 790, 178 S.E. 603; *Miller v. Wood,* 210 N.C. 520, 187 S.E. 765.

That the ownership of the automobile is of no importance when service is being performed for the master was recognized in an earlier decision of the Court below, *P. F. Collier & Son Distributing Corp. v. Drinkwater,* 4 Cir., 81 F. (2d) 200. The Court in that case denied recovery because the employee had completely finished his employer's business and was driving home for a week-end when the collision occurred. It should be noted, however, in connection with the fact that the Marine Officer here was to receive mileage for the travel he was performing when he injured the petitioner, that Judge Parker's opinion in the *Drinkwater case* emphasized the fact that the employer, although obligated to pay the employee mileage between cities on his business route, did not pay him mileage when he went home on weekends. The opinion states that "if the automobile were being used for carrying Long to his home, as an incident in the carrying on of the employer's business, the employer would be liable for negligence in its operation."

That Court has, in earlier decisions, stood among the most liberal in finding right of control and therefore a master-servant relationship as against a claim of independent contractor. In the leading case of *Gulf Refining Co. v. Brown,* 4 Cir., 93 F. (2d) 870, 116 ALR 449, it was held that *respondeat superior* liability existed against the oil company for the delicts of the employees of a local distributor who was made

under his contract with the oil company as independent as language could make him.

It would seem that because this is a suit against the Government the court below has applied different principles than those it would have applied, under its own precedents or those of the North Carolina Court, to the case of a private employer. This is in contradiction of the express purpose of Congress to make the Government responsible in all cases "where a private person would be liable * * * in accordance with the law of the place where the act or omission occurred." (28 USC 941.)

This Court in *United States v. Aetna Casualty & Surety Co.*, December 12, 1949, ... U.S. ...., 18 L.W. 4060, 4064, settled against the Government its contention, made frequently in the lower Federal Courts, that the Tort Claims Act must be strictly construed because it waives sovereign immunity.

The whole purpose of the Tort Claims Act is to provide recompense for injuries done to innocent persons through negligent performance of public service by employees of the Government. The order which the Marine Officer here had received (R. 46) specified that the travel which it enjoined was "necessary in the public service." He was authorized to use his own automobile in performing the ordered travel (B. 44) with the Government paying him for the travel on the basis of eight cents per mile over the most direct route. He was under a military duty to make the trip and remained throughout the trip under the control of his military superiors. It was the actual performance of the ordered travel which injured the petitioner. Under these circumstances, the broad remedial purposes of the Tort Claims Act would be thwarted if the injured party is left without a remedy.

II.

The Travel was on Government Business

The conclusion of the Court below that the Marine Officer was not performing ordered travel when he injured

the petitioner but was going home on leave is rested upon the fact that in a statement given after the collision (R. 39) he stated that he departed from his Cherry Point station on August 20 "en route to my home in Atlanta, Ga., where I intended staying until such time as was necessary for me to proceed in order to report to my next duty station in accordance with my orders." In another written statement (Exhibit 13 in the original record but not printed in the Court below) he stated that he also intended to stop in Raleigh, N.C. to leave his sister who had been with him at Cherry Point. However, both statements are clear that, despite his purpose to stop over at these two points, he was principally motivated by a purpose to accomplish in his own automobile the ordered travel from Cherry Point, N. C., to Corpus Christi, Texas. The Government stipulated (R. 38) that "at the time of the collision, Lt. James B. Talley was acting pursuant to orders contained in 'Bases Transfer Order No. 1041-1946', * * *."

It is true that if the collision had not occurred a few miles west of Cherry Point and the Lieutenant had encountered no delaying factors, the fact that he did not have to report at Corpus Christi, Texas, until ten days after his departure from Cherry Point would have permitted him to enjoy a few days of leave at his home in Atlanta. This potential leave, however, had certainly not commenced at the time of the collision on August 20, when the actual travel was being performed and the officer was still on the most direct route from Cherry Point, N.C. to Corpus Christi, Texas (R. 23, 71).

It is universally recognized that if a servant is acting in part for his master's purposes and in part for his own, the master is responsible for his tortuous acts under *respondeat superior* principles. The *Restatement of the Law of Agency* says (Section 236): "An act may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person." Comment (b) under this section is as follows:

> The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent

> the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service, as where the servant drives rapidly, partly to deliver his master's goods, but chiefly in order that he may terminate his day's work or to return the vehicle to the master's premises. So also, the act may be found to be in the service where not only the manner of acting but the act itself is done largely for the servant's purposes. Thus, where the servant desires to make a brief detour of his own and for the purpose of expediting such trip places the employer's goods by the roadside, intending to pick them up later, the act of so placing them may be found to be within the scope of employment.

The North Carolina decisions agree that the acts of a servant are taken out of the scope of his employment only when they are **wholly** for his own purposes. *Parrott v. Kantor,* 216 N.C. 584, 6 S.E. (2d) 40; *Buckner v. Railroad Co.,* 157 N.C. 443, 73 S.E. 137; *Rogers v. Black Mountain,* 224 N.C. 119, 29 S.E. (2d), 203; *Linville v. Nissen,* 162 N.C. 95, 77 S.E. 1096; *Smith v. Moore,* 220 N.C. 165, 16 S.E. (2d) 701.

In the *Parrott case,* supra, the Court held that if a servant sent to deliver passengers at a town seventy miles away and return the automobile, had selected a return route which would permit him to stop for a visit with his parents, the master would still be liable for the negligent operation of the automobile on the route which went by the parents' home.

Similarly, it has been frequently said that an unfulfilled purpose to deviate from the master's business will not take a servant's act out of the scope of his employment. *Clawson v. Pearce-Arrow Motor Car Co.,* 231 N.Y. 273, 131 N.E. 914; *Elliott-Trant Motor Corp. v. Brennan,* 161 Va. 140, 170 S.E. 601; *Carroll v. Beard-Laney,* 207 S.C. 339, 35 S.E. (2d) 425.

From Justice Cardozo's opinion in the *Clawson case,* supra:

> The driver of the car was engaged in the defendant's business in taking it after the day's work to a place of

storage for the night. He did not abandon the business merely because at the same time that he was attending to it he served some other purpose. * * * The unfulfilled intention of passing the repair shop and returning did not transform the trip in its entirety, and vitiate that part of the service which was legitimate and useful.

From *Pinnix v. Griffin*, 219 N.C. 35, 12 S.E. (2d) 609:

Where the actual employment is admitted, courts should be slow to assume that there has been any deviation from the course of employment upon speculative hypotheses.

These principles were disregarded by the Court below when it held that the intention of the Marine officer to enjoy a few days of leave in Atlanta made the whole of his travel from Cherry Point to Corpus Christi a personal matter rather than a compliance with the order he had received.

III.

The Proper Test is "Line of Duty"

The Court overruled the District Court's conclusion that Congress, in the Tort Claims Act, had prescribed a separate scope of employment test for members of the armed forces—whether they were at the time acting within their "line of duty" as that expression is used in the military establishment.

The District Court based its conclusion upon the clear language of the statute, for Congress provided without qualification in Section 402 (c) of the Act (28 USC 931) that:

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

When Congress thus went out of its way to use the term of art "line of duty" in defining what acts of a military person will subject the Government to *respondeat superior* liability, it must have intended to make a distinction between those acts and the acts of a civilian employee which will create Governmental liability, and the intended distinction

may be given effect only by construing "line of duty" as it has been construed for many years, and necessarily with Congress' knowledge, by the administrative and judicial branches of the Government.

There is no purpose for, or meaning to, Section 402 (c) of the Act if it is not a declaration by Congress that scope of employment is established in the case of a soldier or sailor by a showing that he was acting at the time in his line of duty. The suggestion of the Court of Appeals that Section 402 (c) was enacted merely to give a more apt description of what a soldier or sailor does within the scope of his employment, without at all liberalizing that concept, is an unsound conjecture. If no legal distinction had been intended, Congress would never have opened the door to an argument that a distinction was intended, simply to make a meaningless comparison. Wise or unwise, the Tort Claims Act must be construed as Congress wrote it. *Brooks v. United States*, ... U.S. ...., 93 L.Ed. 884.

There can be no doubt that if "line of duty" is given in Section 402 (c) its fixed administrative interpretation, the Government is liable for the negligence of the Marine Lieutenant here even if he be considered as on leave at the time of the collision. The District Court thus defined "line of duty" (R. 55) and the Court of Appeals does not question the finding:

> The uniform interpretation of the phase "acting in line of duty," as used in the cited statutes, has been that a serviceman would be regarded as acting in line of duty, if at a place required or permitted by his duty and doing something required or permitted by his duty. Of course, he would not be regarded as so acting, if doing something contrary to his duty and acting independently of it, purely in the furtherance of his private business or pleasure.

That this is an accurate paraphrase of the modern definition of "line of duty" as followed by the administrative agencies charged with interpreting and applying other statutes which make benefits depend upon a line of duty find-

ing is absolutely clear. 32 *Op. Atty. Gen.* 12; *Army Regulations,* 345-415, 23 November 1933; *Army Regulations,* 40-1025, 12 October 1940; *Digest of Opinions of the Judge Advocate General of the Army,* 1912-1940, page 952, et seq.; *Compilation of Navy Court-Martial Orders,* 1916-1937, pp. 11, 15, 16, 20; *Veterans Regulation No.* 10, Section VIII, 38 USCA, Ch. 12, p. 669. Judicial decisions are also in accord: *Moore v. U.S.,* 48 Ct. Cl. 110; *Globe Indemnity Co. v. Forrest,* 165 Va. 267, 182 S.E. 25; *Doke v. United Pac. Ins. Co.,* 15 Wash. (2d) 536, 131 P. (2d) 436.

No additional authorities need be added to those cited by the District Court (R. 56) for the rule of construction requiring language which has acquired a fixed administrative meaning to be given that meaning when used in a statute. "Line of duty" is a thoroughly recognized concept and Congress could not have used the language blindly.

That Congress expressly provided for a more liberal *respondeat superior* test in respect to torts of military personnel than for those of other Government employees was early recognized in several of the most thorough law review articles published on the Tort Claims Act. "The Federal Tort Claims Act—A Statutory Interpretation," Irvin M. Gottlieb, Attorney, Claims Division, Department of Justice, in the Georgetown Law Journal for November, 1946, pages 1, 12; "The Federal Tort Claims Act," Yale Law Journal for February, 1947, pages 534, 539.

CONCLUSION

Since the opinion below has the effect of denying Tort Claims Act recovery in all automobile collision cases where a privately owned automobile is being operated on official travel; since it allows an unfulfilled purpose to take leave at a subsequent time and place to remove ordered travel from the category of official action; and since it fails to recognize

the test prescribed by Congress for acts of military personnel, a Writ of Certiorari should issue and the judgment below be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 526

L. HOLMES ELEAZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order for judgment of the United States District Court for the Eastern District of South Carolina (R. 16–31) are not reported. The opinion of the Court of Appeals for the Fourth Circuit (R. 33–40) is reported at 177 F. 2d 914.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 7, 1949 (R. 40). The petition for a writ of certiorari was filed on January 3, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

An official change-of-station order was issued to a marine lieutenant detaching him from his post at Cherry Point, N. C., and directing him to proceed to Corpus Christi, Texas, without specifying any particular means of transportation by which the travel was to be performed. The order also authorized the lieutenant to take several days' leave of absence before reporting to his new post. Availing himself of this leave, he left Cherry Point in his own car for his home in Atlanta, Georgia.

The question presented is whether, under the Federal Tort Claims Act, the United States has assumed liability for damages caused to a third person by the lieutenant's negligent operation and maintenance of his privately owned car while en route to his home for the purpose of spending his leave.

STATUTE INVOLVED

The pertinent provisions of the Federal Tort Claims Act are set forth in the Appendix, *infra* pp. 18–19.[1]

[1] The Federal Tort Claims Act (60 Stat. 842, 28 U. S. C. 921 *et seq.*) was repealed, and its provisions were revised and reenacted into law as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671–2680 by the Act of June 25, 1948, effective September 1, 1948 (Pub. Law 773, 80th Cong., 2d sess.). Section 39 of the repealing act provides that existing rights and liabilities shall not be affected by the repeal. Since the case at bar arose prior to the repeal, it appears that any rights which petitioner may have against the United States

STATEMENT

On August 20, 1946, Lt. James B. Talley, who had been stationed at the Marine Corp Air Station in Cherry Point, N. C., received an order to report to a station at Corpus Christi, Texas (R. 10). The order authorized him to delay in reporting until September 1, 1946, "such delay to count as leave" (R. 10).[2] Talley accordingly left Cherry Point on August 20, driving his own car, "en route to [his] home in Atlanta, Ga., where [he] intended staying until such time as was necessary for [him] to proceed in order to report to [his] next duty station in accordance with [his] orders" (R. 10).

Shortly after he left Cherry Point, and while applying his brakes in the process of overtaking a vehicle ahead of him, Talley's car swerved to the left side of the road and hit petitioner's oncoming automobile (R. 20). As a result of the collision, petitioner suffered physical injuries. Since these injuries had occurred during the course of his employment by the F. B. I., the United States, under the Federal Employees' Compensation Act, paid petitioner's medical and hospital expenses amounting to $2,780.35 (R. 31).

herein, are governed by the Federal Tort Claims Act as it existed at the time of the repeal. It is the former provisions of the Act, therefore, which are set out in the Appendix, *infra*, pp. 18–19.

[2] The order is reprinted in the court's findings of fact (R. 17–19).

Petitioner then brought this suit against the United States under the Federal Tort Claims Act (R. 1–3). His complaint alleged that his injuries were caused by the negligence and carelessness of Lt. Talley, an employee of the United States, who "while acting within the scope of his employment and in line of duty," operated his car "at a high and dangerous rate of speed * * * on a wet pavement with worn and defective tires * * * without having the same under reasonably safe and proper control or equipped with proper and adequate brakes and other mechanism for the safe operation thereof" (R. 3).

The United States filed an answer denying that Talley was negligent and alleging that petitioner was contributorily negligent (R. 4–6). As a separate defense, the United States alleged that Lt. Talley "was on leave of absence, traveling to his home * * * at the time and place of the accident * * * [and] * * * was not acting within the course and scope of his employment for the defendant and was not acting in line of duty at such time and place" (R. 5).

Subsequent examination of the Talley car showed that the right front and rear tires were "slick—no tread on them," that there was loose grease under the brake drums and bands, and that "the right rear wheel contain[ed] very much grease, which was caused from a bad, defective grease retainer" (R. 11, 12). It was also shown that there had been a heavy rain the day of the

accident so that the highway was very wet (R. 3, 11). Petitioner's expert witness testified that the effect of "putting on the brakes on a slick surface of this smooth tire and this brake situation" would be to cause the car "to swerve to the left" (R. 13).

After the trial, the district court, in addition to finding that petitioner's injuries were proximately caused by Lt. Talley's negligence, and that there was no negligence on the part of petitioner, concluded that "Lt. Talley's negligence is imputable" to the United States because "Lt. Talley was acting in line of duty at the time of plaintiff's injuries" (R. 30). It entered judgment against the United States in the sum of $30,000, less the costs of medical and hospital expenses which the United States had already paid under the Federal Employees' Compensation Act (R. 31).

On appeal, the court below applied the conventional *respondeat superior* test and held that in selecting and driving his own automobile to his home for the enjoyment of his leave, Lt. Talley was acting in furtherance of his own purposes and not within the scope of his employment for the Government. It accordingly reversed the judgment of the district court and directed the entry of judgment for the United States (R. 40).

ARGUMENT

Petititoner's chief contention is that Lt. Talley was acting within the scope of his employment at

the time of the accident. He also argues that at the least he is entitled to a judgment against the United States on the theory that the Lieutenant was "in line of duty" at the time of the accident.[3] The decision of the court below rejected both contentions. Since that decision is sound and presents no conflict, we submit that review here by writ of certiorari is unwarranted.

1. Under Section 410 (a) of the Federal Tort Claims Act the United States, in assuming liability for the tortious misconduct of its employees, has assumed such liability only where the employee committed the tort "while acting within the scope of his office or employment." See Appendix, *infra*, pp. 18–19. The Act thus incorporates the conventional *respondeat superior* principle under which a master is made to answer for the negligence of his servants while acting within the scope of their employment, but under which he may not be held responsible for torts committed outside the scope of that employment.

It is familiar law that the *respondeat superior* liability may be imposed only where the master-

[3] Petitioner also intimates, in support of his contentions, that "because this is a suit against the Government," the court below "strictly construed" the Federal Tort Claims Act against him (Pet. 12). However, as petitioner is fully aware, the theory of strict construction was neither urged nor even suggested by respondent in the proceedings before the court below. Nor does the opinion of that court justify the intimation that it relied on any theory of strict construction. To the contrary, that opinion makes it clear that the court below decided the case "just as though [the United States] were a private person" (R. 38).

servant relationship is shown to have existed at the time of the injury and with respect to the very transaction out of which the injury arose. *Brailas* v. *Shepard SS Co.*, 152 F. 2d 849, 850 (C. A. 2), certiorari denied, 327 U. S. 807; *Lamb* v. *Interstate SS Co.*, 149 F. 2d 914, 917 (C. A. 6); *Mid-Continent Pipe Line Co.* v. *Whiteley*, 116 F. 2d 871 (C. A. 10). That relationship, in turn, as observed by the court below (R. 35), can exist only where (a) the employee was engaged on the employer's affairs, and (b) the latter has the right and power to direct and control the employee in the performance of the negligent act or omission which caused the injury. See *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 221; *Phelps* v. *Boone*, 67 F. 2d 574 (C. A. D. C.), certiorari denied, 291 U. S. 677; *Craige* v. *Austin Powder Co.*, 91 F. 2d 664 (C. A. 4); *P. F. Collier & Son Co.* v. *Hartfeil*, 72 F. 2d 625 (C. A. 8); *Standard Oil Co.* v. *Parkinson*, 152 Fed. 681, 682 (C. A. 8); *Brady* v. *Chicago & G. W. Ry. Co.*, 114 Fed. 100 (C. A. 8).[4] Neither of those two factors is present here.

a. The facts of this case fully establish that at the time of the accident, Lt. Talley, as stated by the court below, was "acting in furtherance of his own purposes, not those of the government"

[4] Despite petitioner's assertion to the contrary (Pet. 5, 8, 11), the pertinent North Carolina decisions, as has been pointed out by the court below (R. 37–38), also accord with the federal rule.

(R. 34–35). Talley had been detached from his Cherry Point post and directed to report to Corpus Christi. His travel orders allowed, but certainly did not compel, him to take several days' leave before reporting to his new post. Talley decided, for his own use and personal benefit, to take that leave, to spend it at home in Atlanta, and to use his own car to get there. The leave actually "suspended the execution of the order for change of station, and [it is only] at the expiration of the leave [that] the officer comes under operation of the order." Special Regulations (Army) No. 35–4805–1 and Air Force Manual No. 173–4, ch. 2, par. 17 (c) (1).

An officer on leave is not engaged in the business of the United States. This Court has stated that while on leave, "the officer is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses." *United States* v. *Williamson,* 23 Wall. 411, 415. The leave is a favor extended "for his sole accommodation" to permit him to enjoy "a respite from military duty." *Foster* v. *United States,* 43 C. Cl. 170, 175. "A leave of absence or a furlough is a favor extended. A soldier can not have a furlough forced upon him." *Hunt* v. *United States,* 38 C. Cl. 704, 710. The Government is not interested in where an officer spends his leave, nor how he employs his time during his leave. See 16 Comp. Dec. 611, 616. He could, as far as the Government is concerned, have spent it at Cherry Point, or in Maine, or in California, or at any other place, or not

taken it at all. Likewise, he could have made any arrangements he desired to arrive at the chosen leave destination (R. 15). Here he chose to go to Georgia by his own car. It was, of course, purely coincidental that only one road led from Cherry Point so that even though Lt. Talley was driving home on leave, he nevertheless, as petitioner states (Pet. 13) "was still on the most direct route" between Cherry Point and Corpus Christi. The important factor is that he was traveling along that road, not for the purpose of getting to Corpus Christi, but for the express purpose of going home to Atlanta to spend his leave there (R. 10). As observed by the court below, the Government can no more be held liable for Talley's negligence in operating his car than it would be for the negligent operation of a plane which he might have engaged to fly him to Maine or for the negligent operation of a train he might have boarded to get to any other leave destination (R. 36).

b. In addition to the fact that Lt. Talley was driving his car home on leave, the complete absence of control by the United States over the manner of operation of the car precludes the imposition of a *respondeat superior* liability on the United States. Here the United States left to Lt. Talley the decision as to whether a plane, train, bus or private car should be used.[5]

[5] Regardless of the mode of transportation selected by Lt. Talley, the Government would have been obligated to reimburse him at the rate of 8 cents per mile for the railroad distance between Cherry Point and Corpus Christi, had he completed that travel. Act of August 2, 1946 (60 Stat. 858, 37 U. S. C. 112).

Similarly, it was Lt. Talley alone who decided to use a private car, and who planned the route, determined the type of car, the condition of its repair, the effectiveness of its brakes and the safety of its tires.[6] Thus, Lt. Talley had the final say over the means of transportation and full control over the mechanical fitness and operation of his car. In the circumstances of this case the United States did not and could not exercise any control thereover. These factors, the court below correctly decided, permit no conclusion other than that Lt. Talley was not acting within the scope of his employment at the time of the accident.

2. Apparently recognizing that the facts of this case do not warrant holding the United States liable under the conventional *respondeat superior* test, petitioner argues that the Federal Tort Claims Act, as far as torts of military personnel are concerned, imposes a different and more extended liability than that applicable to torts of civilian employees, and makes the United States liable for the negligent conduct of military personnel, outside as well as within, the scope of their military employment. The argument ad-

[6] As petitioner alleged (R. 3) and as the evidence in this case showed, the accident occurred because "the right front and rear wheels on the Talley car was slick—no tread on them" (R. 11). Additional evidence was to the effect that the "right rear wheel contain[ed] very much grease, which was caused from a bad, defective grease retainer" (R. 12).

vanced is that Section 402 (c) the Federal Tort Claims Act defines "acting within the scope of * * * employment" to mean "acting in line of duty" in case of military personnel,[7] that the phrase "line of duty" has been construed in other statutes in a very liberal fashion so as to include conduct outside, as well as within, the "scope of employment," and that this same liberal construction must be mechanically applied to the Federal Tort Claims Act so as to make the United States liable for practically every tort committed by a soldier or sailor, even though, as far as all other federal employees are concerned, it is conceded that liability does not extend to torts outside the scope of employment (Pet. 15–17).

a. In invoking, for the purpose of the Tort Claims Act, the broad meaning given to the phrase "line of duty" in legislation granting benefits to servicemen or their dependents for an injury or death incurred during the serviceman's period of military service, petitioner ignores the basic reason for that broad meaning. Congress has broadened the "line of duty" concept in such

[7] See Appendix, *infra*, p. 18. This argument, it must be noted, fails to give any significance to the addition of the word "acting." The statutes and decisions dealing with "in line of duty" for veterans' compensation or dependency benefit purposes, upon which petitioner relies, treat it as a status, not requiring any affirmative action on the serviceman's part or close association with the principal's business such as the phrase "*acting* in line of duty" (the equivalent of "acting within the scope of * * * employment") implies. [Emphasis supplied.]

legislation to reward servicemen for the sacrifices caused by their separation from civilian life and for the understandable and desirable purpose of making benefit payments to such servicemen and their dependents in all situations except where the injury or death for which benefits are claimed (1) was the proximate result of the serviceman's own misconduct or (2) occurred while he was deserting the service or under confinement by sentence of a military or civil court. Act of September 27, 1944, 58 Stat. 752; see 32 Op. A. G. 12 (1919).[8] Thus, even injuries sustained by a soldier in the course of his remunerative employment for a private concern while he was on furlough from his military duties have been held to have been incurred in the "line of his duty" with the armed forces for the purpose of awarding him veteran's pension benefits. (Decisions of the Administrator of Veterans Affairs, vol. 1, p. 1470). It therefore follows, if the test contended for by petitioner is correct, that the United States would be liable, under the Federal Tort Claims Act, to a third person injured by that soldier's negligence in the course of his private employ. Thus while a liberal interpretation of

[8] Like considerations account for the results reached in the workmen's compensation cases cited by petitioner (*Globe Indemnity Co.* v. *Forrest*, 165 Va. 267; *Doke* v. *United Pacific Insurance Co.*, 15 Wash. 2d 536) and demonstrate their inapplicability here.

"line of duty" is justifiable to prevent a deprivation of veteran's pension benefits, there obviously is no basis for thrusting a like interpretation into totally different legislation such as the Federal Tort Claims Act. There the relationship of the serviceman to the United States is important only for the purpose of answering the question of whether the serviceman, at the time of the tort, was sufficiently about the business of the United States as to make the United States liable for his torts.

In this connection, it is appropriate to note that it is not unusual for the same words to be used with different meanings in different acts, and in fact, even in the same act. *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 433. This is especially true in legislation affecting servicemen. Thus, this Court has held that a Navy paymaster's clerk is not an "officer" within the meaning of that word as used in one statute (*United States* v. *Mouat,* 124 U. S. 303), but, in a decision handed down the same day, that such a clerk was an "officer" for the purposes of a different statute (*United States* v. *Hendee,* 124 U. S. 309). Such results, far from being inconsistent, simply effectuate the different legislative intent underlying each of the statutes. Cf. *Boston Sand Co.* v. *United States,* 278 U. S. 41, 48; *United States* v. *Dickerson,* 310 U. S. 554,

561. The phrase "line of duty" is not capable of so standard and precise a definition[9] as would permit its application "without help from the context in which it appears and the purpose for which it was inserted in the statute." *Mitchell* v. *Cohen*, 333 U. S. 411, 418–419.

b. Nothing in its legislative history warrants a carry-over to the Federal Tort Claims Act of the broadened "in line of duty" meaning. To the contrary, that history makes it reasonably clear that Congress never intended that the phrase "line of duty," in Section 402 (c), would be the means of imposing liability on the United States for torts committed by military personnel outside the scope of their employment. Congress added the phrase "line of duty" to the "scope of employment" definition in Section 402 (c), because soldiers and sailors are generally not considered to be employees of the United States and hence the phrase "scope of employment" would have uncertain and awkward application to their conduct. As observed by the court below, the "line of duty" language was "doubtless used" to

[9] Apart from veterans' benefit legislation, where there is a direct need for expanding the "line of duty" concept so as to award benefits to servicemen and their dependents, the phrase "line of duty" has frequently been restricted to acts performed in the discharge of required employment duties and has been limited to performance of the work of employment. *Allen* v. *Burlington, C. R. & N. R. Co.*, 57 Iowa 623, 627; *Mesker* v. *Bishop*, 56 Ind. App. 455, 464.

"more correctly" describe the conduct of military personnel in acting for the Government (R. 39). This was also expressly recognized by Congress in specifically defining "employee of the Government," in Section 402 (b) of the Federal Tort Claims Act, to mean "members of the military or naval forces of the United States." (Appendix, *infra,* p. 18). Further recognition was manifested in the committee reports accompanying several of the earlier tort claim bills which incorporated language similar to that appearing in Section 402 (b) and (c). See H. Rep. 667, 69th Cong., 1st sess., p. 6, on S. 1912; H. Rep. 286, 70th Cong., 1st sess., pp. 6–7, on H. R. 9285; H. Rep. 2800, 71st Cong., 3d sess., pp. 12–13, on H. R. 17168.

These definitions, it was pointed out at hearings on the predecessor bills, were inserted to "make it clear that the act covers all Federal agencies, including corporate instrumentalities, and all Federal officers and employees, *including members of the military and naval forces* and temporary and uncompensated employees." (Emphasis supplied.) Hearings before the House Committee on the Judiciary, 77th Cong., 2d sess. on H. R. 5373 and H. R. 6463, p. 7. The apt language purposely used by Congress in making certain that the Act would not be held inapplicable to torts of military personnel, should not, we submit, be wrenched "out of its context" so

as to escape the Act's emphasis in basing the liability of the United States on a normal *respondeat superior* relationship. (See *United States* v. *Campbell,* 172 F. 2d 500, 503 (C. A. 5), certiorari denied, 337 U. S. 957.)

c. On the basis of these considerations, the court below observes that it was "not impressed with [petitioner's] argument" (R. 38). All of the reported decisions in cases in which the same argument has been advanced are in accord with the court below in refusing to stretch the "line of duty" criterion of the Act so as to include conduct not within the scope of the military tortfeasor's employment. *United States* v. *Campbell,* 172 F. 2d 500 (C. A. 5), certiorari denied, 337 U. S. 957; *Rutherford* v. *United States,* 73 F. Supp. 867 (E. D. Tenn.), affirmed *per curiam,* 168 F. 2d 70 (C. A. 6); *Cropper* v. *United States,* 81 F. Supp. 81 (N. D. Fla.); *Murphey* v. *United States,* 79 F. Supp. 925 (N. D. Cal.); see also *Fries* v. *United States,* 170 F. 2d 726 (C. A. 6), certiorari denied, 336 U. S. 954; *Sanchez* v. *United States,* 177 F. 2d 452 (C. A. 10); *Long* v. *United States,* 78 F. Supp. 35 (S. D. Cal.). The Supreme Court of Canada, in interpreting a statute similar to the Federal Tort Claims Act, has also employed the normal *respondeat superior* test in determining liability of the Crown to third persons for the torts of military personnel. *King* v. *Anthony,* Canada Law Reports (S. C. 1946) 569.

CONCLUSION

The decision of the court below is correct and presents no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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FEBRUARY 1950.

APPENDIX

The pertinent provisions of the Federal Tort Claims Act (60 Stat. 842, 28 U. S. C. 931, 941), provided as follows:

SEC. 402. As used in this title, the term—

* * * * *

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omis-

sion of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

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